

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN EILER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Reno, Nev.

*Docket No. 96-646; Submitted on the Record;
Issued January 12, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's April 20, 1995 request for review of the merits of her claim under 5 U.S.C. § 8128.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's April 20, 1995 request for review of the merits of her claim under section 8128.

In this case, appellant, a nursing assistant, filed a traumatic injury claim (Form CA-1) on December 31, 1992 alleging that on December 30, 1992 she sustained an injury to her right buttock and right elbow when she slipped on a patch of ice in the driveway on the employing establishment's premises. Appellant's claim was accepted by the Office for a buttocks contusion and right elbow contusion.

On January 5, 1994 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on January 3, 1994 she experienced shoulder pain and stated that she had a "long week of extreme lifting more than I usually do."

On April 25, 1994 the Office accepted appellant's claim for a contusion of the right buttock and right elbow.

By letter dated August 16, 1994, the Office advised appellant that the evidence of record established that she sustained right buttock and elbow contusion/strain caused by the December 30, 1992 employment injury. The Office further advised appellant that the record did not establish that she had a right shoulder injury notwithstanding physical therapy notes revealing complaints regarding her right shoulder. The Office also advised appellant that the record revealed that she had recovered from her December 30, 1992 injuries and that she had returned to full duty. The Office then advised appellant that she may have sustained a new

injury on January 3, 1994 and not a recurrence of disability caused by the December 30, 1992 employment injury because her Form CA-2a indicated that she had a long week of extreme lifting which was more than she usually lifted and that this activity preceded her alleged January 3, 1994 recurrence of disability. The Office advised appellant to not file an occupational disease claim because it would adjudicate her claim based on the existing record, but to submit medical evidence supportive of her claim.

By decision dated September 30, 1994, the Office found the evidence of record insufficient to establish that appellant sustained a new injury on or about January 3, 1994 or that appellant sustained a recurrence of disability of the December 30, 1992 employment injury on or about January 3, 1994 accompanied by a memorandum.

In an April 20, 1995 letter, appellant requested reconsideration of the Office's decision accompanied by several documents.

By decision dated May 4, 1995, the Office denied appellant's request for reconsideration without reviewing the merits of the claim on the grounds that the evidence she submitted was repetitive, cumulative, irrelevant and immaterial. In an accompanying memorandum, the Office found that appellant failed to submit evidence establishing a causal relationship between her current right shoulder condition and the accepted December 30, 1992 employment injury.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on January 11, 1996, the only decision properly before the Board is the May 4, 1995 Office decision denying appellant's application for review.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without review of the merits of the claim.³

In support of her request for reconsideration, appellant submitted a February 7, 1995 letter from Carol M. Walton, president of Local 2152, requesting that Dr. William T. Miyazaki, an osteopath, complete the necessary paperwork regarding appellant's condition. Appellant also submitted a March 4, 1994 medical report of Dr. Jonathan E. Laine, Board-certified in emergency medicine, noting a history of appellant's medical treatment and family, appellant's

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1); *Thankamma Mathews*, 44 ECAB 788 (1993).

³ 20 C.F.R. § 10.138(b)(2).

complaint of a headache, and his findings on physical examination. Dr. Laine further noted that appellant complained about an old right upper extremity employment-related injury that occurred one year ago. Dr. Laine concluded that appellant had an acute headache. Further, appellant submitted a statement for modified-duty assignment signed by Bonnie L. Lane, appellant's supervisor, revealing the duties that appellant could perform, and routing and transmittal slips dated January 8, 1993 from an employing establishment head nurse, whose signature is illegible, regarding appellant's return to light-duty work with restrictions accompanied by a list of duties that appellant could perform. The January 3, 1994 emergency treatment note of a physician whose signature is illegible revealed that appellant may return to work and undergo reevaluation by her physical therapist, and the January 16, 1994 emergency treatment note of a physician whose signature is also illegible indicated that appellant should be treated with ice and anti-inflammatory medication. The Board finds that this evidence is not relevant to the issue in this case, whether appellant sustained a recurrence of disability causally related to the accepted December 30, 1992 employment injury. Evidence that does not address the relevant issue involved in the case does not constitute a basis for reopening a claim.⁴

Additionally, appellant submitted prescription forms from Dr. Kurt W. Schlegelmilch, a Board-certified internist, indicating that appellant could perform light-duty work, Dr. Schlegelmilch's January 3, 1993 emergency treatment note indicating that appellant should remain off work that day and that appellant may be able to perform light-duty work, Dr. Schlegelmilch's January 11, 1993 emergency treatment note revealing that appellant should continue with light-duty work and Dr. Schlegelmilch's January 27, 1993 emergency treatment note indicating that appellant could return to work. Appellant also submitted the Office's September 30, 1994 decision denying compensation benefits and accompanying memorandum, and the Office's August 16, 1994 letter requesting that appellant submit medical evidence supportive of her claim. The Board finds that this evidence is duplicative because it was already of record.⁵

In a January 13, 1993 report, Jann Dorman, a physical therapist, indicated that appellant's back was feeling much better, that appellant responded well to the ice treatment, and that appellant continued to demonstrate tenderness to palpation over the right rotator cuff and that she would continue to work on this condition as well as appellant's elbow pain. The Board finds that the report of appellant's physical therapist is of no probative value inasmuch as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.⁶

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the

⁴ *Ernest J. LeBreux*, 42 ECAB 736 (1991).

⁵ *Philip J. Deroo*, 39 ECAB 1294 (1988).

⁶ 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

Office,⁷ the Board finds that the Office was not required to review the merits of appellant's claim.⁸

The May 4, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 12, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ Following the issuance of its May 4, 1995 decision, the Office received additional medical evidence. This evidence cannot be considered for the first time on appeal by the Board as it was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁸ *Nora Favors*, 43 ECAB 403 (1992).